

Committee on Resources

Subcommittee on Fisheries Conservation, Wildlife and Oceans

Witness Testimony

Magnuson-Stevens Fishery Conservation and Management Act

Reauthorization Issues - Council Chairmen's Recommendations

presented by

Joseph M. Brancalone, Chairman, New England Fishery Management Council

to the Committee on Resources

House Subcommittee on Fisheries Conservation, Wildlife and Oceans

Thursday, July 22, 1999

On behalf of myself and the other seven Council Chairman, I would like to thank the members of the Subcommittee for the opportunity to present our views. First let me say the Council Chairmen believe the Magnuson-Stevens Act as amended in 1996 is a good piece of legislation and it is working. Many of our most important fisheries are prospering and we are seeing significant improvements in a majority of the overfished stocks under management. The changes we suggest are not substantial, but we believe they will serve to enhance and improve the Act. The points I make in this presentation concern only the reauthorization issues on which the chairs reached consensus. I believe individual Councils have positions on additional topics which I'm sure they will communicate as the reauthorization process moves forward. The Chairs discussed this document in a fair amount of detail at our meeting in late June. I'm happy to answer questions on any of the issues we covered or on issues of concern to the New England Council.

- **Rescinding the Congressional Prohibitions on IFQs or ITQs**

Currently Section 303(d)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (M-S Act) prohibits a Council from submitting or the Secretary from approving an Individual Fishing Quota (IFQ) system before October 1, 2000. Section 407(b) prohibits the Gulf Council from undertaking or continuing the preparation of a red snapper IFQ program or any system that provides for the consolidation of permits to create different trip limits for vessels in the same class before October 1, 2000. If the reauthorization process is completed in 1999, the Council chairmen support rescinding these provisions before the year 2000 deadline. The chairmen also oppose extending the moratorium on IFQs.

- **Establishment of Fees**

The Council chairmen are opposed to the imposition of fees that are not regional in nature and dedicated by the Councils, and are concerned about the ability of depressed fleets to pay fees. However, we do support the National Academy of Sciences recommendation that Congressional action allow the Councils maximum flexibility in designing IFQ systems and allow flexibility in setting the fees to be charged for initial allocations, first sale and leasing of IFQs [M-S Act Sections 303(d)(2-5) and 304(d)(2)].

- **Coordinated Review and Approval of Plans and their Amendments and Regulations**

The Sustainable Fisheries Act (SFA) amended Sections 304(a) and (b) of the M-S Act to create separate sections for the review and approval of plans and amendments and for the review and approval of regulations. Accordingly, the approval process for these two actions now proceeds on separate tracks, rather than concurrently. The SFA also deleted the 304(a) provision allowing disapproval or partial disapproval of an amendment within the first 15 days of transmission. The Council chairmen recommend modification of these provisions to include the original language allowing concurrent approval of plans and amendments as well as regulations and providing for the initial 15-day disapproval process. The Councils would also like the ability to resubmit responsive measures without having to submit a complete fishery management plan or amendment, as now required by subsection (4) of Section 304(a).

- **Regulating Non-Fishing Activities of Vessels**

The Council chairmen recommend that Section 303(b) of the Act be amended to provide authority to Councils to regulate non-fishing activities by vessels that adversely impact fisheries or essential fish habitat (EFH). One of the most damaging activities to such habitat is the anchoring of large vessels near habitat areas of particular concern (HAPC) or other EFH (e.g., coral reefs, etc.). When these ships swing on the chain deployed for anchoring in 100 feet, 20 to 70 acres of bottom may be plowed up by the chain dragging over the bottom. Regulation of this type of activity by the Councils should be allowed.

- **Collection of Economic Data [Section 303(b)(7)]**

Language throughout the M-S Act specifies the collection of biological, economic, and socio-cultural data to meet specific objectives of the Act and for the fishery management councils to consider this information in their deliberations. However, Section 303(b)(7) specifically excludes the collection of economic data, and Section 402(a) precludes Councils from collecting "proprietary or confidential commercial or financial information." NMFS should not be precluded from collecting such proprietary information so long as it is treated as confidential information under Section 402. Without this economic data, multi-disciplinary analyses of fishery management regulations are not possible, preventing NMFS and the Councils from satisfying the requirements of the M-S Act and the Regulatory Flexibility Act (RFA). These inconsistencies should be resolved.

The chairmen recommend amending the M-S Act to eliminate the restrictions on the collection of economic data. Amending Section 303(b)(7) by removing "other than economic data" would allow NMFS to require fish processors who first receive fish that are subject to a plan to submit economic data. Removing this current restriction will strengthen the ability of NMFS to collect necessary data and eliminate the appearance of a contradiction in the law requiring economic analyses without allowing collection of the necessary data.

- **Confidentiality of Information [Section 402(b)]**

Section 402 replaced and modified former Sections 303(d) and (e). The SFA replaced the word "statistics" with the word "information", expanded confidential protection from information submitted in compliance with the requirements of an FMP to information submitted in compliance with any requirement of the Act and broadened the exceptions to confidentiality to allow for disclosure in several new circumstances.

The following draft language clarifies the word "information" in 402(b)(1) and (2) by adding the same parenthetical used in (a), and deletes the provision about observer information. The revised section would read as follows (additions in bold):

(b) CONFIDENTIALITY OF INFORMATION.--

*"(1) Any information submitted to the Secretary by any person in compliance with any requirement under this Act, **and that would disclose proprietary or confidential commercial***

or financial information regarding fishing operations or fish processing operations shall not be disclosed, except--

A. to Federal employees and Council employees who are responsible for fishery management plan development and monitoring;

B. to State or Marine Fisheries Commission employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

C. when required by court order;

D. when such information is used to verify catch under an individual fishing quota program; or

E. when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act."

*(2) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement under this Act, **and that would disclose proprietary or confidential commercial or financial information regarding fishing operations, or fish processing operations**, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (1)(E).*

- **Enforcement**

The Council chairmen support the implementation of a cooperative state/federal enforcement programs patterned after the NMFS/South Carolina enforcement cooperative agreement. While it is not necessary to amend the Act to establish such programs it is consistent with the changes needed to enhance management under the Act to suggest to Congress that they consider establishing and funding such cooperative state/federal programs.

- **Council Member Compensation** The Act should specify that Council member compensation be based on the General Schedule that includes locality pay. This action would provide for a more equitable salary compensation. Salaries of members serving in Alaska, the Caribbean, and Western Pacific are adjusted by a COLA. The salary of the federal members of the Councils includes locality pay. The Department of Commerce has issued a legal opinion that prohibits Council members in the continental U.S. from receiving locality pay. Congressional action, therefore, is necessary.

- **Observer Program**

The chairmen reaffirm their support to give discretionary authority to the Councils to establish fees to help fund observer programs. This authority would be the same as granted to the North Pacific Council under Section 313 for observers.

- **Essential Fish Habitat**

The 1996 Act required the Councils to identify and describe EFH, but gave little direction on how to designate EFH. The EFH definition, i.e., "those waters and substrate necessary to fish for spawning,

breeding, feeding or growth to maturity," allows for a broad interpretation. The EFH Interim Final Rule encouraged Councils to interpret data on relative abundance and distribution for the life history stages of each species in a risk-averse manner. This led to EFH designations that were criticized by some as too far-reaching. "If everything is designated as essential then nothing is essential," was a common theme throughout the EFH designation process, on a national and regional scale. Either the EFH definition should be modified, or the guidance on how to use different types of data should be more specific.

- **Rebuilding Periods**

The Councils should have greater latitude for specifying rebuilding periods than is provided under the National Standard Guidelines. Social and economic factors should be given equal or greater consideration in determining schedules that result in the greatest overall net benefit to the Nation.

- **Redefine "Overfishing"**

The chairmen believe there are a number of problems related to MSY-based definitions of overfishing. For example, data deficiencies may lead to inappropriate calculations of MSY, which in turn affect overfishing definitions. Ultimately, this could lead to unnecessary social and economic impacts for fishermen who are subject to measures that are tied to stock rebuilding schedules. While we have no specific recommendations at this time, we would like to work further with the Subcommittee in seeking solutions to our concerns as the reauthorization process proceeds. This is an extremely important issue to the Councils but, through our conversations with NMFS staff, we appreciate that there are varying viewpoints to be considered before we are able to present clear, concise and productive recommendations on what is the foundation of the SFA.

- **Receive Funds from any State or Federal Government Organization**

Currently Councils can only receive funds through the Department of Commerce, NOAA or NMFS. The Councils routinely work with other government organizations to support research, workshops, conferences or to procure contractual services. In a number of cases, complex dual contacts, timely pass-throughs and unnecessary administration or grant

oversight were required to complete the task. The Councils request a change that would give them authority to receive funds or support from other local, state and federal government agencies and non-profit organizations. This would be consistent with Section 302 (f)(4) that requires the Administrator of General Services to provide support to the Councils.

- **Bycatch Issues**

There appears to be an inconsistent definition of bycatch, depending on geography. In the Atlantic, highly migratory species harvested in catch and release fisheries managed by the Secretary under 304(g) of the Magnuson Stevens Act or the Atlantic Tunas Convention Act are not considered bycatch, but in the Pacific they are. We suggest that highly migratory species in the Pacific, managed under a Western Pacific Council fishery management plan and tagged and released alive under a scientific or recreational fishery tag and release program, should not be considered bycatch.

Note that there also is an inconsistency between the Magnuson-Stevens Act definition of bycatch and the NMFS Bycatch Plan. The NMFS definition is much broader and includes marine mammals and birds and retention of non-target species. The Council chairmen prefer the Magnuson-Stevens Act definition. We also wish to retain turtles in the definition of "fish" because of their importance in every region and especially in past and possibly future fisheries pursued by indigenous peoples of the Western Pacific Region.

- **FMP Review Program**

The chairmen believe that NMFS, in its review of proposed plans, amendments and framework adjustments, has failed to adequately communicate to the Councils perceived problems in a timely manner. We propose the inclusion of a mandate in the Act to require that NMFS consult with the Councils before disapproving fishery management plans, amendments or changes made through the abbreviated rule-making process.

- **NMFS Regional Administrator Emergency Action Vote**

For the purpose of preserving the Secretary's authority to reject a Council's request for emergency or interim action, the NMFS Regional Administrator is currently instructed to cast a negative vote even if he/she supports the action. While we recognize the extreme sensitivity in recommending a change to the voting responsibilities of our partners in the National Marine Fisheries Service -- we certainly do not wish to appear to be disparaging the Regional Administrators in any way -- the Council chairmen believe that Congressional intent is being violated by this policy. We instead suggest a modification to the language of Section 305(c)(2)(A) as follows (new language in bold):

*(A) The Secretary shall promulgate emergency regulations or interim measures under paragraph (1) to address the emergency or overfishing if the Council, by unanimous vote of the members (**excluding the NMFS Regional Administrator**) who are voting members, requests the taking of such action; and . . .*

- **MAFMC At-Large Seat**

The Council chairmen recommend that an additional At-Large seat be added to the Mid-Atlantic Fishery Management Council (MAFMC) along with funding identified for that purpose. Such a seat would, most likely, be filled by an individual from the state of North Carolina. This would allow the state to have both a recreational and commercial representative on the MAFMC.

Mr. Chairman, I would like to thank you for this opportunity to comment on the Magnuson-Stevens Act reauthorization. As I mentioned earlier, I'm also happy to answer questions or provide further information about the positions taken by the Council chairmen.

#####